SABRINA LOO CHENG SUAN

v.

EUGENE KHOO OON JIN

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[CIVIL SUIT NO. 338/83]
26 AUGUST 1994

FAMILY LAW: *Chinese customary marriage in 1973 during prior subsisting marriage - Whether valid - Section 4(1) & (2) Law Reform (Marriage & Divorce) Act 1976.*

TRUSTS: *Matrimonial home - Whether outright gift to wife - Whether held under resulting trust of husband's share - Presumption of advancement - Whether rebuttable - Whether acts and circumstances prevailing before and at the time of the acquisition and transfer showed common intention otherwise.*

PRACTICE & PROCEDURE: *Pleadings - Whether evidence adduced represented radical departure or variaton, modification or development of pleaded allegation.*

PRACTICE & PROCEDURE: *Counterclaim by defendant - Action by beneficiary to recover trust property from a trustee - Whether statute-barred - Section 22 (1)(b) Limitation Act 1953.*

The plaintiff claimed vacant possession of property registered under her name whereas the defendant counterclaimed for a declaration that the plaintiff held the property on trust for his benefit and enjoyment and that beneficial ownership resided in him absolutely. The defendant had purchased the property on 21 September 1971 in the plaintiff's name and had lived there with her and their daughter, Karen Khoo until April 1975 and the plaintiff had lived there until January 1985. It was conceded that the purchase price of the property, most of the quit rent and assessment outgoings and cost of repairs, alterations and improvements were borne by the defendant.

The plaintiffs claimed that the property was an outright gift to her but the defendant claimed it was matrimonial property and was held on trust by the plaintiff for the defendant's benefit. The plaintiff claimed that since the defendant was already married under English law he could not have legally married her and that further, the presumption of advancement applied to the property. The plaintiff also argued that the defendant's counterclaim was statute-barred as it was not brought within 12 years from 1970, when the house was purchased.

Held:

[1] The evidence showed that the parties had undergone a Chinese customary tea ceremony of marriage in 1973. Chinese customary marriages entered into before 1 March 1982 were valid although polygamous. Therefore, the plaintiff's marriage to the defendant was valid under s.4(1) & (2) of the Law Reform (Marriage & Divorce) Act 1976.

[2] On the evidence, the defendant had rebutted the presumption of advancement and has established that the plaintiff held a half undivided share in the said property in trust for him. The property was a matrimonial home and common property. The presumption of advancement can be rebutted by showing from the acts and circumstances prevailing before and at the time of acquisition and transfer of the property that there was a common intention of no advancement.

[3] The defendant's belated acknowledgement that the plaintiff had a share in the property did not represent a radical departure from his pleading but was at most a variation, modificaton and development of what has been alleged, which evidence could be accepted.

[4] Since the defendant's counterclaim was an action by a beneficiary to recover trust property from a trustee, no period of limitation applies under s.22 (i)(b) of the Limitation Act. Therefore the defendant's counterclaim is not time-barred.

[5] Since the property was practically wholly financed by the defendant and the plaintiff and their daughter were exclusively supported by him, it would be highly inequitable and against the norms of social justice to order him to quit and/or pay occupation rent until their marital status is legally anulled.

[Plaintiff's claim dismissed. Plaintiff to transfer half share of the property to the defendant]

Cases referred to:
Dorothy Yee Yeng Nam v. Lee Fah Mooi [1956] MLJ 257 ***(refd)***
Mong Kuen Wong v. May Wong [1948] NZLR 348 ***(refd)***
*Grant v. Grant 55 ER 776 and Wan Naimah v. Wan Mohamad Nawawi [1974] 1 MLJ 41****(refd)***
Neo Tai Kim v. Foo Stie Wah [1982] 1 MLJ 170 ***(foll)***
Chua Cheow Tien v. Chua Geok Eng & Anor. [1968] 2 MLJ 180 ***(refd)***
Shepherd v. Cartwright [1955] AC 431 ***(refd)***
*Warren v. Gurney [1944] 2 All ER 472****(refd)***
Moate v. Moate [1948] 2 AER 486 ***(refd)***
*Superintendent of Lands and Surveys (4th Divison) & Anor. v. Hamit bin Matusin & 6 0rs. [1994] 3 MLJ 185****(refd)***
G.L. Baker Ltd. v. Mederay Building & Supplies Ltd. [1958] 1 WLR 1216 ***(refd)***
Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. [1983] 1 MLJ 213 ***(refd)***
Clarapede & Co. v. Commercial Union Association [1883] 32 WR 262 ***(refd)***
Ketteman v. Hansel Properties Ltd. [1988] 1 All ER 38 ***(refd)***
Hancock Shipping Co. v. Kawasaki Ltd. [1992] 3 All ER 132, 136 ***(refd)***
Steamship Mutual Underwriting Association Ltd. v. Trollopex Colls (City) Ltd. [1986] 33 Build LR 77 ***(refd)***
Government of Malaysia v. Mohd Amin bin Hassan [1986] 1 MLJ 224 ***(refd)***
*AR. Pl. Palaniappa Chettiar v. Lakshamanan Chettiar [1983] 2 MLJ 177****(refd)***
Dennis v. McDonald [1981] 2 ALL ER 632 ***(refd)***

Legislation referred to:
Christian Marriage Enactment
Christian Marriage Ordinance
Civil Marriage Ordinance 1952
Law Reform (Marriage and Divorce) Act 1976, ss. 4(4)(2), 5, 76(3)
National Land Code 1965, s. 340
Rules of the High Court 1980, O. 20 r. 5(1)(2)(5)
Limitation Act 254, ss. 22(i)

Other sources referred to:
Stroud's Judicial Dictionary of Words and Phrases 4th. Edn., p. 1569
Halsbury's Laws of England 4th. Edn., Vol. 48 para. 607

For the plaintiff - Lakshmi Ganesh; M/s. Lakshmi Ganesh & Co.
For the defendant - Yeap Chye Choon (Goh Siew Kin with him); M/s. B.C. Teh & Yeoh

JUDGMENT

Vincent Ng Kim Khoay J:

The plaintiff, at all material times the registered proprietress of premises No. 60 Jalan Sungai, Kelian Hillside, Tg. Bungah, Penang (the said premises) held under Geran No. 27376 Lot No. 1155 Bandar Tanjong Bungah, Daerah Timur Laut, Pulau Pinang (the premises with land shall hereinafter be jointly referred to as the property), had claimed for vacant possession of the said property, damages and cost. The defendant then counterclaimed for, *inter alia*, a declaration that the plaintiff had held the said property in trust for the benefit and enjoyment of the defendant and that the beneficial ownership of the property vested in the defendant absolutely and for other consequential prayers.

At the commencement of the trial the Bundle of documents were marked as "AB" and the statement of agreed facts, as "AF". The following were the agreed facts:

1. The defendant purchased the property known as No. 60, Jalan Sungei Kelian, Hillside, Tanjong Bungah, Penang (hereinafter called the "said property") in the plaintiff's name and the same was registered in her name on 21 September 1971.
2. The plaintiff's and the defendant's daughter, Karen Khoo Su Li, had lived with the plaintiff until January 1985.
3. The plaintiff through solicitors gave to the defendant notice to quit the said property in March 1983.
4. The plaintiff and the defendant have not lived together since April 1975.
5. The defendant has paid no rent to the plaintiff in respect of the said property.

On submission by Counsel for both parties the following was also expressed as common ground:

1) Property was registered in the name of plaintiff on 21 September 1971 but the transfer form of National Land Code was executed on 23 June 1971.
2) The purchase price was wholly borne by the defendant partly in cash and through a loan from UMBC.
3) All the assessment and quit rent outgoings for the said premises were borne wholly by the defendant from 1971 to the first half of 1984 and 1986, and assessment for 2nd half of 1993.
4) All correspondence receipts bills relating to the premises were kept by the defendant.
5) All the relevant documents in the Agreed Bundle pertaining to the property were prepared by the defendant and signed by the plaintiff.
6) The sum of RM19,000 was paid by the plaintiff resulting in a retransfer of the property to her.
7) Repairs, alterations and improvements were made and expended by the defendant before and after acquisition of the said property.
8) In AB88 to AB91, AB92, AB93, AB94, the plaintiff was referred as Mrs Eugene Khoo or Mrs Sabrina Khoo and in AB49, AB12, AB16, AB44 and AB46, as "my wife" or "wife" or contained expressions "common law marriage" and "divorce".
9) Defendant had received the notice to quit dated 26 March 1983.

At the trial, both the plaintiff and the defendant called no witnesses and each gave testimony on her or his own behalf.

The material part of the plaintiff's evidence is as follows:

The plaintiff (aged 44 years) said she was a housekeeper. Sometime in July 1970, the defendant gave the said property to her as a gift because he had wanted her to be his mistress. Though, at that point in time she had wanted to be his wife, that was not possible because he was then already married to one (an English woman) named Dorothy Harriet Khoo (Dorothy). The defendant paid the full purchase price for the said property. She was very sure that it was an outright gift to her because she was then staying there, her daughter by him named Karen Khoo Su Li (Karen) was born there and the defendant had also expressly said that the said property was to be a gift to her. Even during their courtship in 1969 he had promised to get her a house to stay as she was then staying with her mother in a rented house in Tanjong Tokong whilst he was staying with Dorothy and their four children in Bukit Glugor, Penang. Sometime in early 1970 he told the plaintiff that he had found a house to acquire, and after she had inspected same at his request she moved in to stay there alone so that the defendant could come to see her everyday.

Sometime in 1972, after the birth of Karen on 13 April 1971, and after Dorothy and the four children left Malaysia to reside permanently in England, the defendant moved in to live with the plaintiff in the said property. In February 1975 the defendant took a loan of RM13,000 from one Dr. Loh Guan Lye (Dr. Loh) and requested the plaintiff to transfer the said property to Dr Loh as a collateral on the loan, which she did. Although the plaintiff did not take any amount on the said loan, she repaid to Dr. Loh the whole of it in 1982, then amounting to RM19,000 inclusive of interest, and Dr Loh retransferred the said property back to her on 25 May 1982, as shown from the copy of issue document of title ("AB3 & 4").

She admitted that she had affirmed a statutory declaration on 9 August 1977 ("AB47" directed at Dr. Loh) nominating the defendant as the transferee in the said retransfer of the said property and indemnifying Dr. Loh against any claims, actions etc. in respect thereof. But, she insisted she had signed AB47 to regain her freedom and as the result of being harrassed and threatened by the defendant during 1975 to 1977. He even brought their daughter who was then 4½ years old to her workplace at Joanne Drew Figure Salon in Kuala Lumpur and pleaded with her to return and stay with him in the said property. In 1975 and 1976, she used to return to the said property to stay during public holidays and weekends, and one night when she refused to have sex with the defendant, he - who was then very drunk - tried to suffocate her with a pillow and then tried to strangle her with his bare hands. On 9 January 1981 she made another statutory declaration (Exh. AB5) to revoke the contents of AB47.

In cross-examination she acknowledged having signed a note dated 25 February 1975 addressed to Dr. Loh (AB43) personally acknowledging receipt of RM13,000 but said that in actual fact it was the defendant who had received the loan. She denied having signed a letter dated 2 June 1975 (incorporated into the Agreed Bundle) to the Income Tax Department (AB42) informing them that the "property was purchased by Mr. Eugene Khoo of ..... but registered in my name". The plaintiff also denied that a tea ceremony was held sometime in 1973 in her aunty's house to confirm her marriage under Chinese rites to the defendant. After Karen was born she and her mother accepted the defendant as her husband, and her friends had often called her Mrs. Khoo. However, later in cross-examination she said that they treated each other as husband and wife only after Dorothy had left the defendant and he moved in to stay with her in 1972. When Mr. Yeap Chye Choon, for the defendant put to her this

question: "the whole purpose of the defendant buying the said property was to provide both yourself and the child with a matrimonial home", she answered in the positive. She agreed that in December 1977 after she had affirmed AB47 on 9 August 1977, she had also sent a birthday card (AB95) to the defendant.

Then, in re-examination, contrary to her testimony earlier, she said that her mother never accepted the defendant as her husband even after the birth of the child. The plaintiff further said, he had told her that he acquired the said property for her because he wanted her to be his second wife (she had earlier said mistress). Dorothy eventually divorced him after the plaintiff telephoned her in Sussex, England in February 1975, in her words: "to inform her that I was the other woman the defendant was living with and that I had a child by the defendant." Finally, she admitted: "I left the defendant because I found out that he had lied to me and he never trusted me. He behaved as though he owned me and I never had my freedom. He was a gambler and a smoker and was heavily indebted to people and I could not be responsible for his debts..." And, the plaintiff closed her case.

The defendant, aged 72 years and a retired lawyer testified as follows:

He met the plaintiff at his office at 48B Bishop Street, Penang in July 1969 after she had won the Miss Penang contest. He was then 47 years old and married to Dorothy. The plaintiff was then single and only 19 years old. The relationship blossomed until she became Miss Malaysia in November or December 1969. She was then aware that he was legally married to Dorothy. When he discovered that the plaintiff was pregnant with a child, he asked her to be his second wife, to which she agreed partly because she wanted to get away from the turmoil and bad relationship between her and her mother. Consequently, by a Chinese customary tea-ceremony conducted at her aunt's house at No. 12F Arraton Road, Penang, the plaintiff and the defendant were married under Chinese rites. In that tea-ceremony the plaintiff, her aunt, her younger sister and mother were present. As the plaintiff's mother was separated from her father then, soon thereafter, he took the plaintiff and baby Karen to Klang to pay their respects to her father.

The said property was never meant as a gift from him to her and he had never told her, that that was to be a gift, at any time during their relationship. He also said that he would get a house for both of them to stay because sometime during the later part of 1969, she and her mother had informed him that the landlord of the house in which they were staying in Fettes Park intended to regain possession of the house. At that point in time, his professional client, one named Lee Eng Voon, verbally offered to allow him to repair and move into the said property with an option to purchase, as it was in a very dilapidated condition. The repairs on the said property commenced sometime in January 1970, which took 3 to 4 months to complete. It took 1½ years for his said client, the vendor to execute the transfer of the said property to her because the said premises was not habitable until repaired, and he did not have much money to complete the transfer, as he had spent RM25,000 to RM30,000 on the repairs. Thus, the transfer was only concluded and registered on 21 September 1971. The said property was registered in the plaintiff's name as he had intended to hide this transaction from Dorothy. He had genuinely intended to use the said property to start a second family in Penang, as Dorothy and the children were then leaving him to go back to England, and in consequence his residence in Glugor had to be sold in order to purchase another house in England for them to stay. As Penang was to be the base of his professional practice - with much uncompleted legal work to handle - the said property was to all intents and purposes to be a matrimonial home for himself, the plaintiff and Karen. And, this intention was expressly conveyed to the plaintiff at the time the said property was purchased. After

she became pregnant with Karen, they had treated each other as husband and wife. Not only had he paid for all the plaintiff's expenses - including her substantial overseas travel expenses - until she left him, but he had also paid for all for his daughter's education and maintenance expenses until 1988.

He denied that he had in any way coerced the plaintiff to make the statutory declaration (AB47). This is evidenced by the fact that even after AB47 was signed, the plaintiff had sent a birthday card to him in December 1987 (AB95) bearing expressions of love and endearment. The plaintiff had also signed AB42 in his presence on 2 June 1975, which disclosed that the said property was purchased by him but registered in her name. The sum of RM10,000 of the loan of RM13,000 taken from Dr Loh was for the plaintiff's expenses for her round-the-world trip (in 1974) to attend the beauty pageant in Los Angeles. It was on account of this, that she signed the acknowledgement receipt (AB43). (At this point it is noted by the Court that AB43 mentions two cheques being UMBC Cheque No. 28505 dated 21 February 1975 for RM3,000 and OCBC Cheque No. 285206 dated 24 February 1975 for RM10,000). He said the balance sum of RM3,000 was to enable him to repay the bank (UMBC) to secure a discharge of the charge against the said property. Because the loan was primarily for her own use the sum of RM18,000 - then due thereon inclusive of interest - was repaid by the plaintiff personally. Indeed, it was Dr. Loh who had suggested to him that the loan ought rightly to be repaid by the plaintiff.

In cross-examination he agreed that he did not oppose Dorothy's petition against him for divorce (AB85 indicates that the divorce decree was made on 13 October 1975). Dorothy and their children left him for England in July 1971. Nevertheless, he had no intention of going back to his family in England as he had not lived in England and had never acquired the right of abode. He admitted that sometime after baby Karen was born he had treated the said property as a matrimonial home and by the time the transfer was executed he had formed the intention to give the plaintiff a share in the said property, though at the time of purchase he had not decided in whose name to put as title holder. He did not ask the plaintiff to declare a trust as she knew all along that she held the said property in trust for him, and he had told her so when she moved in as he had then nowhere to stay. They were very happy at that time and whatever he told her to sign, she just signed and she understood what he said. He insisted that he was still married to the plaintiff but acknowledged that the marriage had irretrievably broken down.

Hence, after carefully studying the evidence of both parties herein and noting that the evidence of both the plaintiff and the defendant contained several inconsistencies, I accept on the balance of probabilities, the defendant's version that he had acquired the property on 21 September 1971 with the intention of using same as a matrimonial home in which both of them had equal undivided shares rather than as an outright gift to the plaintiff. This version was closer to the truth, as this assertion became, in essence, the common factor that emerged between the parties as their evidence evolved. The plaintiff had contended that the property was not a matrimonial home but was in fact the defendant's gift of love to the plaintiff (probably to serve as a love nest), as the defendant was not and could not be legally married to the plaintiff while his marriage to Dorothy Khoo under English law was then subsisting.

It was contended that upon the principle enunciated in the case of *Re Ding Do Ca* (*deceased*), [1966] 2 MLJ 220, a Chinese male who marries under a law providing for monogamy, has lost the right to have a plurality of wives. I disagree, as, indeed on the contrary, *Re Ding Do Ca (supra)* had in fact held that there was nothing in the Christian Marriage Enactment that deprives a Chinese man who marries under it from exercising his right which he enjoys by

reason of his personal law to enter into a polygamous union with another woman whilst his monogamous wife is still alive.

The law on the question of marriage and succession rights applicable to persons of Chinese race domiciled in this country have historically taken the following progressive evolution.

In *Dorothy Yee Yeng Nam v. Lee Fah Mooi* [1956] MLJ 257, Thomson J (as he then was) held (in a divorce case) that the only conclusion that can be drawn from the *Six Widow's case*, 12 SSLR 120 which is the *locus classicus* on the subject is that as regards persons of Chinese race the question of personal law is based on race. The Courts in effect have given judicial recognition to certain customs prevalent or thought to be prevalent among persons of Chinese race irrespective of their domicile or religion. They had thus set up what might be called a sort of common law affecting persons of Chinese race.

Then, six years later in (a succession case) *Re Loh Toh Met deceased* [1961] 27 MLJ 234, Thomson CJ (as he then was), delivering judgment on behalf of the Court of Appeal held thus:

> .....the Courts have consistently recognised among inhabitants of Chinese origin the custom whereby a man could enter into a permanent conjugal relationship with a principal spouse called a 't'sai' and then during the existence of that relationship enter into equally permanent relationships with other women known as 't'sip'. The Courts have held that though the status of the 't'sai' and the 't'sip' may not be in all respects the same yet each has a definite legal status and that the children of their unions have the status of legitimacy. In particular as regards distribution in the case of intestacy the law has been interpreted to give the female partners to such unions equal rights in the widow's share and to treat all the natural children as children of their common father.

The *ratio decidendi* in that case was that for the purposes of the Distribution Enactment, Chinese polygamous marriages are lawful and a Chinese domiciled in this country can contract such a marriage irrespective of whether or not he professes the Christian religion. Consequently, the children of such marriages are legitimate.

The principles laid down in the above two cases were very neatly distilled by Thomson LP in (a succession case) *Re Ding Do Ca, deceased* (decided by the Federal Court in 1965). Therein he held that, as the personal law governing persons of Chinese race in this country resulted from their race and not from membership of any religious community or domicile and such persons are permitted under their personal law to take secondary wives (with unfettered capacity to contract polygamous marriages) the deceased Ding Do Ca, who had, in 1923 married one Madam Wong under the Christian Marriage Enactment, could in law yet (subsequently in 1937) contract a valid second marriage with one Madam Ngoi by going through the form of marriage according to Chinese custom or rites, even though his monogamous wife was alive and that marriage was then subsisting. It was thus decided that there was nothing in the Christian Marriage Enactment (or the later Christian Marriage Ordinance) corresponding to the provision of the Civil Marriage Ordinance 1952, which renders a party of Chinese race who had married under it incapable during its continuance of contracting a polygamous marriage.

Lord Thomson LP in *Re Ding Do Ca (Decd.)* revealed some disquiet concerning this state of law applicable to persons of Chinese race when he wound up his judgment with the following words:

> As regards persons professing Islam the position is tolerably clear. But as regards persons of Chinese race the law the Courts are administering is probably different from any law that exists or ever has existed in China. It even differs from the law which is applied in at least

a one other jurisdiction within which there are large numbers of locally-domiciled Chinese persons (see *Mong Kuen Wong v. May Wong* [1948] NZLR 348). The same sort of position may well arise in relation to persons professing the Hindu religion by reason of the enactment in India of the Hindu Marriage Act, 1955.

The questions involved are questions which go to the very root of the law relating to the family which, after all, is the basis of society at least in its present form, and the existence b of a civilised society demands that these questions be settled beyond doubt by legislation which will clearly express the modern mores of the classes of persons concerned and put the rights of individuals beyond the chances of litigation.

Consequently, and presumably in response to the clarion called by Lord Thomson for legislative correction of the situation, the Law Reform (Marriage and Divorce) Act 1976 (the Act) was legislated. Thus s. 5 and 6 of this reform Act reversed the hitherto existing state c of law and introduced monogamy into a large section of the community, which by religion, custom and usage had always given recognition to polygamous marriage. The new provisions forbade any person who has already lawfully married under any religion, custom or usage from contracting a further marriage during the continuance of the existing marriage.

However, it is important here to note that as the Act came into operation only on 1 March 1982, the state of law ante implementation, governing persons of Chinese race on the question d of marriage and succession rights, as enunciated in *Dorothy Yee, Re Loh Toh Met* (*deceased*) and *Re Ding Do Ca* prevailed. The current case is one of such cases unaffected by the 1976 Reform Act. This being the case, in 1973 there was no legal impediment against both the plaintiff and the defendant entering into a Chinese customary marriage between themselves while the defendant was married to Dorothy Khoo; thus, making the latter the principal wife and the plaintiff the second wife. And, the Court accepts, on the balance of probability, the e defendant's testimony that he had entered into a form of marriage with the plaintiff by performing the Chinese customary marriage ceremony. It would follow that by virtue of s. 4(4) and (2) of the Act, which reads:

(1) Nothing in this Act shall affect the validity of any marriage solemnised under any law, religion, custom or usage prior to the appointed date.

f [Date of implementation being 1 March 1982]

(2) Such marriage, if valid under the law, religion, custom or usage under which it was solemnised, shall be deemed to be registered under this Act.

and applying the dictum in *Re Lee Choon Guan (deceased)* [1935] (Vol. IV) MLJ 78 and *Tan Ah Loy's* case [1920] AC 376 - as to the requisite elements in a marriage under Chinese rites g - I hold that the plaintiff and defendant was at all material times deemed to be legally married, with all the attendant ramifications.

However, be that as it may, the legal capacity of the defendant to enter into the second marriage under Chinese rights is not in issue. What is in issue is, whether considering the circumstances surrounding the acquisition of the property on 21 September 1971, the defendant had acted the way he did in getting the property registered in the name of the h plaintiff, because he had intended to take the plaintiff as his second wife and to start a family with someone of his own race. And, whether at the material time, as they had intended to treat each other as husband and wife there existed an understanding that the said property was to be a matrimonial home, in which each was to hold an equal undivided share, with an implied trust created in favour of the defendant on his share.

i

The following factors plainly show that the plaintiff had held at least half undivided share of the said property in trust for the defendant:

(i) It is in evidence that at the time when the property was purchased the defendant's marriage with his first wife Dorothy was already on the rocks, and the latter was then about to leave for England with his children. Consequently, it was highly probable that the defendant had intended to have the plaintiff as his second wife by performing certain marriage ceremonies under Chinese rights;

(ii) Around that time the plaintiff became so intimate with the defendant that shortly thereafter she became pregnant with the defendant's child;

(iii) The Court believes the defendant's story that consequential to (ii) above such marriage ceremony was in fact carried out;

(iv) The plaintiff herself had admitted that her mother and she had treated the defendant as her husband; and,

(v) The more than ample documentary evidence in the Agreed Bundle that the plaintiff was variously addressed and known as "Mrs. Eugene Khoo" or "Mrs. Khoo", and had sent several birthday cards to the defendant signing off with expressions of endearment such as; "from your dearest wife". Such uncontroverted evidence would also lead the Court to hold that at the time of registration of the transfer in her name it was the understanding of both parties that the said property was to be a matrimonial home in which both of them were to be equal co-owners of same.

My further finding that the plaintiff had signed AB47 voluntarily and had also readily signed the transfer of the premises to Dr. Loh at the defendant's behest, would militate against her contention that the whole of the premises was meant to be an outright and absolute gift to her by the defendant. I do not accept her version that AB47 dated 9 August 1977 was signed under duress, considering that she had on her own volition sent a card AB95 to the defendant in December 1977, signing off: "With love ....love is for always ... to my husband happy birthday." Though the plaintiff had sworn AB5 on 9 January 1981 to recant AB47 dated 9 August 1977, yet be it noted that AB5 was effected about 3½ years after she had nominated the defendant to be the transferee of the property, and should thus be disregarded.

Being then young and still manifestly available, this may have meant her desire not to be lumbered with a spent husband and a child. This being the case, such consideration itself may have impelled her to, which she did, sign away whatever interest if at all she had in the property, to, according to her own words: "regain my freedom." Thus, the voluntary execution of AB47 constituted documentary confirmation by her that she had held at least half share interest in the said property in trust for the defendant.

The defendant had also testified that at the time when the property was purchased, his first wife Dorothy and the children by her was about to leave for England and he had to sell his then residence in Glugor to purchase a house for them in England. And, as no evidence was adduced by the plaintiff to show that the defendant had any other property residential or otherwise to enable him to reside, his story that he had purchased the said property for use as a family or matrimonial home to bring up his second family in Malaysia is highly credible. Indeed, when Counsel for the defendant put the question to the plaintiff that the whole purpose of the defendant buying the property was to provide herself and their child with the matrimonial home, the plaintiff's answer was in the affirmative. This admission affords further disclosure of the true picture that occurred at the material time when the property

was acquired. To summarise: the voluntary transfer of the property to Dr. Loh by the plaintiff at the request of the defendant; the swearing of the Statutory Declaratory (AB47) in favour of the defendant; and the liberal manner in which the plaintiff had treated the property; is consistent with the property being a common property between the parties hereto.

The defendant had also averred in paragraphs 2 and 3 of his counterclaim that the plaintiff had held the said premises on a resulting or implied trust for his benefit and enjoyment. Such trust need not be in writing. See *Grant v. Grant* 55 ER 776 and *Wan Naimah v. Wan Mohamad Nawawi* [1974] 1 MLJ 41. The general principles governing such trust have been well expounded in the English cases of *Gising v. Gising* [1971] AC 886, *Pettitt v. Pettitt* [1969] 2 All ER 385, *Eves v. Eves* [1975] 1 WLR 1338, *Grant v. Edwards* [1986]1 Ch.D 638 and *Lloyds Bank Plc v. Rosset* [1991] AC107; being that where the relationship between the parties are close e.g. married couples or unmarried couples intending to be married, then in the event one of them acquires property in the name of the other and has acted to his or her detriment by making a significant contribution to the purchase price in cash or kind, a resulting or implied trust is presumed in his or her favour. In the current case, there are undisputed facts that the defendant had paid the full purchase price and had expended on virtually all outgoings, renovations and improvements on the said property. However, in the Singapore Court of Appeal case of *Neo Tai Kim v. Foo Stie Wah* [1982] 1 MLJ 170, which I am more logically inclined to follow, it was held that if the parties are husband and wife and the husband is the provider of the funds for the purchase of the property and puts it in the name of his wife a resulting or implied trust in favour of the husband does not arise as the doctrine of the presumption of advancement comes into play on behalf of the wife to negative such trust in favour of the husband. Notably, the English case of *Gissing v. Gissing* [1986] 1 Ch 638 was considered in both the cases of *Tan Thiam Loke v. Christina Woon Swee Kheng* [1992] 1 Supreme Court Reports 371 and in *Neo Tai Kim (supra)*. From meticulous reading of the English authorities it would appear that the presumption of resulting or implied trust could only operate in favour of the legitimate wife (see *Gissing v. Gissing (supra)*) or the intended female spouse (see *Eves v. Eves* [1975] 1 WLR 1338, *Bernard v. Joseph* [1982] 1 Ch 391 and *Grant v. Edwards and Anor*. [1986] 1 Ch 638).

I would now turn to briefly comment on the following points of law raised by the plaintiff's Counsel:

(a) Re: The plaintiff's title is indefeasible under s. 340 of the National Land Code as she was at all material times the registered proprietress. I hold that this provision is inapplicable in a case where a claimant could, by adducing facts or circumstances prove, on a balance of probabilities that the property was held in trust in his or her favour; and the current case is such case.

(b) Re: There were two transactions over the said property - one in 1971 when the property was first registered in the plaintiff's name and the second in 1982 when the property was transferred by Dr Loh to the plaintiff upon the repayment of RM13,000 loan with interest.

Evidence led has shown that the 1982 transfer from Dr. Loh to the plaintiff was not by any reckoning a purchase transaction. Although the second dealing of the property was by way of a transfer from Dr. Loh to the plaintiff, unless the Court takes a blinkered view of the evidence adduced I cannot but hold that this transfer was, to all intents and purposes, in the nature of a discharge of charge, by way of redemption upon full satisfaction of the loan from Dr. Loh to the defendant. It is obvious that she needed the money for her expensive travels as a Malaysian beauty queen and she had obviously repaid this sum to Dr. Loh while being fully conscious that the loan to the defendant was for her own use. There was thus no second transfer.

(c) Re: The contention in the alternative (pursuant to paragraph 1 of the Amended Reply and Defence to Counterclaim redated 12 March 1993) that if the defendant's case is that the said property was intended to be at the material time a matrimonial home, then the plaintiff must be his wife or intended wife and a presumption of advancement in her favour arises.

In the Singapore case of *Chua Cheow Tien v. Chua Geok Eng & Anor*. [1968] 2 MLJ 180 which followed the English cases of *Shepherd v. Cartwright* [1955] AC 431 and *Warren v. Gurney* [1944] 2 All ER 472, Chua J had, quite appropriately restated the settled law on the presumption of advancement with this illustration: if A buys property in the name of B, who is no relative, B is held to be trustee of that property for A, but if B is a child or a wife of A no trust is presumed, and the law presumes that the legal and beneficial ownership is in the child or the wife so that the onus is on those who seek to rebut the presumption and establish an absolute trust for the father or husband.

It was further held in *Moate v. Moate* [1948] 2 AER 486 that for the purposes of deciding on the application of the doctrine of presumption of advancement, there was no practical distinction between a purchase by an intending husband in the name of an intending wife, "when the marriage was merely in contemplation" and a purchase by a husband in the name of a wife; a presumption of advancement arose in both cases, as "it is entirely contrary to hold otherwise." [See also cases *Tan Thaim Loke, Eves v. Eves* and *Grant v. Edwards & Anor. (supra)*].

It may be of interest to note that the presumption of advancement is applicable against not only the father but any other person in *loco parentis* to a child. According to **Stroud's Judicial Dictionary of Words and Phrases** (4th Edn.) p. 1569, a person in *loco parentis* means "a person taking upon himself the duty of a father of a child to make a provision for that child" per Jessel MR, *Bennet v. Bennet,* 10 Ch. D. 477; hence, such person could include an uncle or an elder brother of the child. Thus, where a father or other person in *loco parentis* purchases property in the name of a child or transfers property into the name of a child, the transaction does not create a resulting trust for the purchaser or transferor, but is an advancement or gift to the child, unless there is evidence of a contrary intention at the time of the transaction, or the circumstances are such as to raise a presumption against the advancement or gift. The rule is the same where a purchase, investment or transfer is made in the joint names of purchase or transferor himself and a child, or in the joint names of a child and a stranger, or in the name of an illegitimate child towards whom the father has placed himself in *loco parentis*. A mere moral obligation to provide for the other person is not, however, sufficient to rebut the resulting trust. (See **Halsbury's Laws of England** (4th Edn.) Vol. 48 para 607.

The doctrine of presumption of advancement is a rebuttable presumption and can be rebutted if the defendant as in the current case, can show from acts and circumstances prevailing before and at the time of the acquisition and transfer of the property, that there was between him and the plaintiff a common intention that it was to be otherwise.

In deciding whether the presumption had been rebutted I have taken into consideration:

(i) the undisputed facts that I have adumbrated earlier in my judgment;

(ii) both of them testified that the said property was to be a matrimonial home;

(iii) the property was voluntarily mortgaged (by way of transfer and retransfer) to Dr. Loh by the plaintiff at the request of the defendant; indeed, according to the plaintiff, for the benefit of the defendant;

(iv) the swearing by the plaintiff of the statutory declaration AB47, which was voluntarily made in favour of the defendant;

(v) the plaintiff's voluntary execution of AB42 wherein she acknowledged that the property was purchased by the defendant but registered in her name;

(vi) the defendant could and did at all material times deal with the said property in any manner he had wished, and her acquiescence of such permissive dealings would be inconsistent with the belief that the property was to be wholly and absolutely hers; and

(vii) the impression I gained from seeing and hearing both the parties giving evidence in the witness box was that the plaintiff was not telling the whole truth and had on several occasions prevaricated. On the other hand, the defendant struck me as a witness who had nothing to hide.

For all the above reasons, I find that the defendant has, on the facts of the case which I accept, discharged the burden which rested on him of rebutting the presumption of advancement and he has thus established that the plaintiff had held half undivided share in the said property in trust for him.

However, the defendant's pleading was in the alternative on the issue of whether the plaintiff held the whole or half of the said property for him in trust. As his belated acknowledgement that the said premises was a home in which the plaintiff had a share, did not represent a radical departure from pleading but at most a variation, modification or development of what has been alleged in the pleading, the Court accepts his evidence on this score. See *Superintendent of Lands and Surveys (4th Divison) & Anor. v. Hamit bin Matusin & 6 0rs.* [1994] 3 MLJ 185.

(d) Re: The plaintiff's averment, in paragraph 5 of the Amended Reply and Defence to Counterclaim redated 12 March 1993, that the defendant's claim was time barred. In this regard, for the purpose of clarification, be it noted that though the Defence was filed on 16 August 1983 the defendant had sought and was granted leave from the Court to file the amended defence and counterclaim only on 15 January 1993. The leave sought by defendant was, at that time, resisted on the grounds that the proposed counterclaim was then statute-barred for being an action for recovery of land or on trust filed in excess of the 12 year time limit. However, Mohamed Dzaiddin J (as he then was) had:

i) by virtue of the provisions of O. 20 r. 5(1), (2) and (5);

ii) on the grounds that the counterclaim did not comprise a fresh claim as the defendant had also pleaded in paragraph 1 of his original defence that the said premises: "is and was at all material times held by the plaintiff in trust for the use and enjoyment of the defendant absolutely and that the beneficial ownership of the said premises vests in the defendant"; and

iii) following the principles laid out in the cases of *G.L. Baker Ltd. v. Mederay Building & Supplies Ltd.* [1958] 1 WLR 1216, p. 1231, ("for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings"); *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 MLJ 213, which followed *Clarapede & Co. v. Commercial Union Association* [1883] 32 WR 262, "(Courts to adopt a liberal attitude to amendments)"; *Ketteman v. Hansel Properties Ltd.* [1988] 1 All ER 38, ("there is a clear difference between allowing amendments to clarify the issues in dispute and those that provide distinct defence or claim to be raised for the first time)"; and, *Hancock Shipping Co. v.*

Kawasaki Ltd. [1992] 3 All ER 132, 136 ("where relevant period of limitation had expired leave may still be given if new cause of action which arises out of the same or substantially the same facts and the Court thinks it just to grant leave) read in conjunction with *Steamship Mutual Underwriting Association Ltd. v. Trollopex Colls (City) Ltd.* [1986] 33 Build LR 77 at 59, ("there must be sufficient overlap between the facts averred in the existing pleading and the new claim");

rightly allowed the defendant leave to amend and to add his counterclaim. (See also *Government of Malaysia v. Mohd Amin bin Hassan* [1986] 1 MLJ 224 - leave refused if amendment was not to correct name of party but tantamount to addition of new and different party after expiry of limitation period.)

There was no appeal by the plaintiff against this decision. Be that as it may, Counsel for the plaintiff had quite rightly (due to leave being granted) pegged the operative date of the counterclaim as 16 August 1983 (not 15 January 1993) and directed her attack by submitting that the defendant's counterclaim was nevertheless still time barred, since the property was, in her view, purchased in 1970 and the cause of action also arose in 1970; and as the defence and counterclaim was dated 16 August 1983 the defendant's claim would be a little past the 12 year time limit.

On the facts:
It is this Court's view that the date on which to peg the date of acquisition of the property should essentially be 21 September 1971, as that was the date on which the sale of the property was finalised and registered in the name of the plaintiff (*vide* the Interim Register of the relevant title (AB3)). In this context the Court accepts the defendant's explanation that: the said premises was not habitable until repaired; in 1969 he had only an option to purchase; and did not have much money to complete the sale until September 1971. Furthermore, the fact that the said property was purchased from his own professional client on liberal terms was not challenged by the plaintiff.

On the law on Limitation:
In any event, this being an action by a beneficiary to recover trust property from a trustee, it is settled law that by virtue of the provisions of s. 22(i)(b) of the Limitation Act 254, no period of limitation prescribed by that Act shall apply to it. See the Privy Council decision in *AR. Pl. Palaniappa Chettiar v. Lakshamanan Chettiar* [1983] 2 MLJ 177. See also *Lee Ngok Mooi v. Yeung Yick Chun* [1993] Mallal's Digest parag. 1007 p. 466 - where the property was transferred to defendant in 1977 and the suit by the plaintiff for (and who had indeed secured) a declaration that the property was held in trust for her was filed in 1990.

Therefore, for all the above reasons, I dismiss the plaintiff's claim and allow the defendant's counterclaim, but only to the extend that this Court declares that both the plaintiff and the defendant hold the said property as a matrimonial home with each holding equal beneficial share of same at all times.

On the question of damages or rental claimed by the plaintiff
I have earlier held that the plaintiff and defendant have entered a valid Chinese customary marriage and such marriage is deemed under s. 4(2) of the Act to be a registered and valid marriage.

The plaintiff had also said in re-examination as follows:

> I left the defendant because I found out that he had lied to me and he never trusted me... I never had my freedom.

As such, it is clear that she had left the matrimonial home voluntarily because she had wanted to regain her freedom and was thus not driven out of the house by the defendant; and I so hold.

As such, guided by the principles established in *Dennis v. McDonald* [1981] 2 ALL ER 632 and as I have found that the said property was common property between the parties, I hold that the defendant shall not be required to pay rent for its occupation from the time the plaintiff left the premises until the date of annulment of their marriage. *Dennis v. McDonald (supra)* laid down the principle that where an association similar to a matrimonial relationship broke down and one party was excluded from the family home by the other party, the principle that a tenant in common was not liable to pay an occupation rent merely by virtue of being the sole occupant did not apply and the Court had power on general principles to order the occupying party who was a tenant in common with the excluded party to pay an occupation rent to the excluded party **if it was equitable** that such a rent should be paid. However, where a spouse (legal or *defacto*), who is tenant in common or co-owner of a family or matrimonial home is in a position to enjoy his or her right to occupy but chooses not to do so voluntarily, then the other who is in occupation is entitled to do so free of any liability to pay an occupation rent. Indeed, in that English case, Dennis and McDonald were not married but they both had cohabited since 1962 and had five children from their relationship, whereby the family home was purchased through funds provided by the parties more or less in equal shares.

In the instant case, the defendant had borne the whole purchase price and substantial expenses on improvements, maintenance and virtually on all other outgoings on the said property since its acquisition. Indeed, the plaintiff and daughter Karen were exclusively supported by him, not forgetting that for most of the time the plaintiff was not gainfully employed but, rather, kept herself busy, if at all, maintaining her status as a beauty queen. Thus, considering all these factors, it would be highly inequitable and against the norms of social justice to order him to quit and/or pay an occupation rent, unless and until their martial status - that I have earlier in my judgment held to be still subsisting - is legally annulled. She should have petitioned to Court for a proper divorce and for division of assets under s. 76(3) of the Act.

As the plaintiff now stands as a registered holder of the whole of the said property, I further declare that she holds half undivided share of the property in favour of the defendant. Consequently, I order the plaintiff do transfer half undivided share of the said property to the defendant within fourteen (14) days from date hereof, and in the event of her failure to do so, the Senior Assistant Registrar of the Penang High Court shall execute such transfer on behalf of the plaintiff in favour of the defendant. Each party herein shall bear his or her own costs of this action.

Though it may now appear feasible, yet it is neither appropriate nor proper for me at this stage to order that the property be sold and the net proceeds be equally divided between the parties; or that one party shall buy the other out of the property on the highest bidder basis. For now, the Court would only order, as I hereby do, that the parties be at liberty to apply for variation of the consequential order concerning the order for transfer of the half undivided share of the said property to the defendant, and for further consequential order where appropriate.

In postlude, I am constrained to say that I couldn't help nothing with regret and some distaste, the venom spat out at each other by both the parties, more so by the plaintiff, in the course of their evidence during the trial. I am sure that both of them started their relationship in

joyous though surreptitious circumstances, no less contributed by the fact that their entirely diverse, disparate and dissimilar needs happened to coalesce and dovetail and were mutually met at that material time. On the one hand you have the plaintiff, then only 19 years old, a veritable beauty queen with only a Standard Six level of education - who had won the Miss Penang beauty contest and soon thereafter became Miss Malaysia - but was otherwise quite deficient on the monetary factor needed to live-up the life of her newly acquired status and to make the trip to attend the Los Angeles Beauty Pageant. On the other hand you have the defendant, then 47 years old, a basic man of a lawyer (a member of a profession confined only to a select few at that time) who ran a successful legal practice, replete with ready funds to provide the financial back-up the plaintiff needed, but who among his other needs, had also succumbed to the stirring of his loins. For a few years this relationship worked admirably well until the expectation of one fell short of his or her needs.

At the end of the day, the parties herein would still have to reckon with the fact that, though perhaps their initial encounter may have been a transient dalliance or frolic with a beauty queen on the part of the defendant, yet their subsequent union - confirmed by marriage under Chinese rites - have produced a daughter who, in the natural order of things, is expected to outlive both of them and who shall bear witness to how one party treats the other in the aftermath of this mutually bruising trial. The defendant who had ceased legal practice many years ago is now 72 years old and plagued with ill-health. The plaintiff has also now apparently lost the vibrancy and glamour of her youth, with scant future prospects, as the result of this platonic relationship which eventually turned sour.

Her sense of loss, frustration and bitterness, which had led her to vindictiveness - to the extent of attempting to introduce irrelevant evidence on the manner and cause of the abrupt termination of the defendant's professional legal practice - is understandable but yet unwise and wholly uncalled for. It is hoped that this case could yet be settled from the standpoint of realism notwithstanding this judgment. In the course of Mr. Yeap's submission he had volunteered the information that the defendant was prepared to abandon his just counterclaim in exchange for the right to stay rent free and spend the last lap of whatever is left of his life in the house that he had bought and paid for. I believe that even under such circumstances of hostility between them, there is still room for magnanimity by one towards the other, if only to demonstrate to their daughter, that at least in the last chapter of their relationship they have finally come to their senses.